No. 15,300

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco,

Appellant,

vs.

LAL SINGH,

Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF OF APPELLANT.

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JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was invoked under Title 28 U.S.C. Sec. 2241 by the filing of a petition for writ of habeas corpus. The petition alleged that "petitioner is detained by the respondent under an order that he be deported from the United States. . . ."

The District Court issued an order to show cause pursuant to Title 28 U.S.C. Sec. 2243. Appellant thereafter filed a return to the order to show cause. Issues of law only were presented by the return. Ap-

pellant was not required to produce appellee, and no traverse or denial of any facts set forth in the return was made. The issues of the case were joined by the petition and the return to the order to show cause.

The jurisdiction of this Court arises under Title 28 U.S.C. Section 2253, which provides in part as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the Court of Appeals for the circuit where the proceeding is had. . . ."

Two notices of appeal were timely filed, one from the order of June 21, 1956 and the other from the order of September 4, 1956 issuing the writ of habeas corpus and discharging petitioner.

STATEMENT OF THE CASE.

The order of the District Court of June 21, 1956 recites the facts. The appellee first entered the United States in 1925 under the name of Garma Singh. He was convicted later in the same year of a violation of the Passport Act of 1918. He was deported, but entered the United States again in 1927 unlawfully and without any inspection. In 1935 he stated under oath to an examining officer of the Immigration and Naturalization Service that he had entered this country only once. In May 1938, a warrant of arrest pursuant to deportation proceedings against the appellee was issued, but it was returned unserved. Thereafter, in 1949, he made an application for registry as an alien,

in which he stated he had entered the United States only once in 1923, and had never been deported. This application was denied when it was learned that he had been previously deported. Appellee was also found to be a person not of good moral character because of his "repeated false statements concerning his arrest and deportation." In 1950 a warrant of arrest in a deportation proceeding was issued charging appellee with being in the United States in violation of the Immigration Act of 1924. The first matter relating to this 1950 warrant of arrest was a hearing before a Special Inquiry Officer on February 8, 1954. The appellee made an application for suspension of deportation under Sec. 244 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254) and a second hearing was held on April 12, 1955. Appellee admitted four arrests for drunken driving. The Special Inquiry Officer found that he was deportable and ordered his deportation. The application for suspension of deportation was denied on the finding that appellee was a person not of good moral character for seven years before the application for suspension (8 U.S.C. 1254(a)(1)). The Special Inquiry Officer did find appellee to have been of good moral character within the meaning of the statutory requirements for the privilege of voluntary departure (8 U.S.C. 1254(e) and 1101(f)) and such privilege was granted.

The order of the Special Inquiry Officer, October 7, 1955, was appealed to the Board of Immigration Appeals. The appeal was dismissed by said Board on November 2, 1955. On December 21, 1955 appellee filed

a motion with the Board of Immigration Appeals to reconsider on the ground that the application for suspension of deportation should be governed by Sec. 19(c)(2) of the Immigration Act of 1917 (8 U.S.C. 155(c)(2)). The Board of Immigration Appeals denied the motion to reconsider on March 2, 1956.

Appellee was ordered to surrender for deportation on May 1, 1956. Appellee did surrender on May 1, 1956 and thereafter filed the petition herein. Appellee was then released on bond pending the disposition of the petition.

QUESTION PRESENTED.

Appellant has stated seven points on appeal. The seven points are resolved into the following question: Does Section 405(a), the "Savings Clause" of the 1952 Act, save to appellee the applicability of Section 19(c) of the 1917 Act as governing his application for suspension of deportation made in 1954 under Section 244(a) of the 1952 Act.

STATUTES INVOLVED.

Section 19(c), Immigration Act of 1917 (8 U.S.C. 155(c)):

> "In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, The Attorney General may (1) permit such alien to depart the United States to any

country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legal*ly* resident who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act * * *."

Section 244(a)(1), Immigration and Nationality Act (8 U.S.C. 1254(a)(1)):

"(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who——

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19(d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen or an alien lawfully admitted for permanent residence; * * *"

Section 405(a), Immigration and Nationality Act (8 U.S.C. 1101, footnote):

"(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended,

or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

Section 101(f), Immigration and Nationality Act (8 U.S.C. 1101(f)):

"(f) For the purposes of this Act——

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was——

(1) a habitual drunkard;

(2) one who during such period has committed adultery;

(3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) of section 212(a), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and

eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of the crime of murder.

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

There was no statutory equivalent of Section 101(f) in the United States Code prior to December 24, 1952.

SUMMARY OF ARGUMENT.

Suspension of deportation is a matter of grace not a matter of right. The conditions or limitations of the discretionary authority, and the eligibility for the relief are determined by the statute in effect at the time the application is filed. A pending application is dependent upon a savings clause in a new act to save the applicability of a repealed act.

Appellee's application was made under Sec. 244(a) of the 1952 Act. The application was filed after the 1952 Act became *effective.* The court below erroneously held that Sec. 405(a), the savings clause of the 1952 Act, saved to appellee the provision of Sec. 19(c) of the 1917 Act as governing the eligibility of appellee.

ARGUMENT.

1. ON DECEMBER 24, 1952 APPELLEE WAS NOT IN ANY "STATUS" OR "CONDITION" NOR DID HE HAVE ANY "RIGHT IN PROCESS OF ACQUISITION" UNDER SECTION 19(c) OF THE 1917 ACT WHICH WAS SAVED TO HIM BY SECTION 405(a) OF THE 1952 ACT.

Appellee is a deportable alien. The action initiated herein does not challenge the proceedings of the Immigration and Naturalization Service insofar as appellee was determined to be deportable on the charges lodged against him. Appellee by his petition sought the judgment of the court below declaring him to be eligible for discretionary relief of suspension of deportation under the provision of Section 19(c) of the 1917 Act as governing his application for such relief filed under Section 244(a) of the 1952 Act.

The legal process invoked by appellee is that of habeas corpus, although an action for a declaratory judgment would appear to be the proper method of seeking the court's judgment. *Ceballos v. Shaughnessy* decided by the Supreme Court March 11, 1957, 25 L.W. 4187. The detention upon which the petition is founded is lawful in that appellee is a deportable alien. It would not appear proper for the court to release appellee from the custody of appellant but rather upon a determination of eligibility to remand for further proceedings involving the exercise of discretion.

The distinction was clearly made in *McGrath v. Kristensen,* 340 U.S. 162, at page 169:

> ". . . Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when

in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under Section 19(c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and the immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of the federal courts, 28 U.S.C. 1331, and the terms of the Declaratory Judgment Act, 28 U.S.C. 2201."

However, in *Accardi v. Shaughnessy,* 347 U.S. 260, the Supreme Court considered the question of failure to exercise discretion arising by way of a petition for writ of habeas corpus. Petitioner was admittedly deportable. The writ was denied by the District Court. The Court of Appeals affirmed, 206 F.2d 897, and the Supreme Court granted certiorari (346 U.S. 884). In its opinion the Supreme Court thought the petition charged the "Attorney General with precisely what the regulation forbid him to do". The court said at page 268:

"If petitioner can prove the allegation, he should receive a new hearing before the Board without

> the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings."

The lower court was reversed and *Accardi* given the opportunity to prove "the allegation" in the District Court. After a full hearing in the District Court, the court found that the Board members "reached their individual and collective decision on the merits, free from any dictation or suggestion. . . ." The Court of Appeals reversed (219 F.2d 77). The Supreme Court reversed the Court of Appeals and affirmed the District Court. *Shaughnessy v. Accardi,* 349 U.S. 280.

Had the District Court found that the Board members reached their decision as a result of dictation, the case would have been remanded to the Board for further hearing. However, *Accardi's* status as a deportable alien would have been unaffected.

The District Court's order herein has granted the writ and discharged appellee from the custody of ap-

pellant, until a new hearing on his application for suspension of deportation is granted. Appellee's status as a deportable alien remains undisturbed.

The grant of the discretionary relief of suspension of deportation is not a matter of right "but rather is in all cases a matter of grace." *Jay v. Boyd,* 351 U.S. 345, 354 (222 F.2d 820; 224 F.2d 957, aff.).

From page 354 of *Jay v. Boyd,* supra, the following is quoted:

> "Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi v. Shaughnessy,* 347 U.S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of a criminal sentence, it 'comes as an act of grace,' *Escoe v. Zerbst,* 295 U.S. 490, 492, and 'cannot be demanded as a right' *Berman v. United States,* 302 U.S. 211, 213."

In Note 16 following the citation of *Berman v. United States,* Judge Learned Hand in *United States ex rel Kaloudis v. Shaughnessy,* 180 F. 2d 489, 491, is quoted as follows:

> "The power of the Attorney General to suspend deportation is a dispensing power like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict."

The matter of the applicability of the Savings Clause, Section 405, has been under consideration by the courts in a number of cases, particularly *United States v. Menasche,* 348 U.S. 528; *Aure v. United States,* 9th Cir. 225 F. 2d 88; *Zacharias v. Shaugh-*

nessy, 2d Cir. 211 F. 2d 578, and *Miyagi v. Brownell,* District of Columbia Circuit, 227 F. 2d 33.

In the *Menasche* case the Supreme Court resolved a difference of view between the Second Circuit in the case of *United States ex rel Aberasturi v. Cain,* 147 F. 2d 449, and the District of Columbia in *Bertoldi v. McGrath,* 178 F. 2d 977.

At page 534 this difference is stated as follows:

> "A second and more significant conflict concerned inchoate rights to derivative citizenship, which when proper conditions were met, required only the passage of time to ripen into full citizenship. When the 1940 Act changed certain of the conditions in this process the question arose whether those whose time had begun to run before the 1940 Act took effect were to be governed by the old law or the new. The Second Circuit held that the new law applied, because Section 347(a) of the 1940 Act did not extend to a 'mere condition unattended by any affirmative action.' *United States ex rel Aberasturi v. Cain,* 147 F. 2d 449. The Court of Appeals for the District of Columbia disagreed, construing the broad language of Section 347(a) as covering 'rights particularly accruing' and 'rights in process of acquisition.' *Bertoldi v. McGrath,* 178 F. 2d 977. This latter conflict must have been paramount in the minds of Congress when the first subsection of the Savings Clause was broadened. . . . We conclude that Congress intended to adopt the principle of the Bertoldi case that 'the new Act should take effect prospectively.' "

Against the contention of the Government in *Menasche,* the Supreme Court held, page 535:

> "The change in the section was designed to extend the Savings Clause already broadly drawn and embodies, we believe, congressional acceptance of the principle that the status quo was to continue even as to rights not fully matured."

In *Aure v. United States,* 225 F. 2d 88, this Court said:

> "Clearly, it is the teaching of the Menasche case, and we are satisfied it was the intent of Congress, that the Savings Clause is not limited to cases involving affirmative action and those concerning derivative citizenship, but its preservation feature should be extended to all substantive rights existing at the time the statute creating the rights was repealed. The real test was whether the 'right' which the alien seeks to have preserved by the Savings Clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies. See *Hallowell v. Common,* 239 U.S. 506, *De La Rama Steamship Company v. United States,* 344 U.S. 386, *Matsuo v. Dulles,* ..... F. Supp. ..... (D.C. Calif. June 1955)".

In the *Menasche* and *Aure* cases the court was concerned with the right of an alien to become a naturalized citizen of the United States. *Aure* had acquired the right under the 1940 Act to be naturalized without being admitted to the United States for permanent residence by taking the affirmative action of filing a petition for naturalization. Menasche, an alien, had filed his declaration of intention to become an American citizen before the effective date of the 1952 Act. His petition for naturalization was filed after the

effective date of the new Act. The Supreme Court, in *Menasche,* held that "respondent's inchoate right to citizenship is protected by Section 405(a) and is not defeated by any implications stemming from Section 405(b)," and affirmed the District Court and the Court of Appeals in their conclusion that Section 405(a) preserved *Menasche's* inchoate rights under the prior law.

In *Aure,* a petition for naturalization had not been filed prior to the repeal of the 1952 Act. As quoted from the decision above this Court held that the "right" which *Aure* sought to have preserved by the Savings Clause is a substantive right as distinguished from a procedural remedy. It is clear in *Aure* and *Menasche* that what the alien sought to have preserved by the Savings Clause was a "right."

Referring again to the cases of *Jay v. Boyd,* supra, and *Kaloudis v. Shaughnessy,* 180 F. 2d 489 (2 C.A.) and to the Ninth Circuit case, *Wolf v. Boyd,* 238 F. 2d 249, suspension of deportation is not a matter of right but a matter of grace. The exercise of discretionary authority is invoked by an application for suspension filed by an eligible applicant.

The two Court of Appeals cases cited by the court below are *Zacharias v. Shaughnessy,* 221 F. 2d 578, a 2nd Circuit Court of Appeals decision, and *Miyagi v. Brownell,* 227 F. 2d 33, a District of Columbia Court of Appeals decision.

In *Zacharias,* a concededly deportable alien seaman sought the privilege of voluntary departure under 8 U.S.C. 1254(e). The crucial question was the appli-

cability of 8 U.S.C. 1101(f)(2) with regard to his eligibility. Prior to the effective date of the 1952 Act, Mrs. *Zacharias* had filed the preliminary papers for an immigration visa for her husband so that he might legally reenter the country from Canada. This application was approved by the New York office of the Immigration and Naturalization Service on January 5, 1953 and forwarded to Montreal. No further action was taken until October 6, 1954 when the application was denied on the grounds that *Zacharias* was ineligible for a visa under 8 U.S.C. 1182(a)(28). In the interim between the filing of the visa application and its denial, *Zacharias* requested preexamination and voluntary departure on April 10, 1953. However, deportation proceedings were initiated. *Zacharias* was found statutorily ineligible for voluntary departure under the 1952 Act. Such determination was affirmed by the Board of Immigration Appeals which rejected his contention that the 1952 Act did not apply to his case. The Second Circuit Court of Appeals held, page 581:

> "We conclude that the preliminary application for the visa in September 1952 was sufficient to bring *Zacharias* within Section 405(a). This application was the first step in his effort to attain legal status in this country."

From this ruling and from the deliberations of the court leading thereto, it is seen that in order to hold that *Zacharias* had a "status, condition, right in process of acquisition, act, thing or matter then done or existing", the court had to construe the act of his wife

in filing the preliminary papers for an immigration visa as the first step or the affirmative action required to invoke the exercise of the discretionary function. The necessary conclusion which flows from the decision is that absent the filing of the preliminary papers, the relief sought by *Zacharias* under the Savings Clause must have been denied.

In *Miyagi,* the deportation proceedings on the ground of illegal entry were begun in 1945. In 1950 *Miyagi* filed a motion for reconsideration. The Board of Immigration Appeals in consequence of the motion withdrew the original order and warrant of deportation, and ordered the hearing "reopened for the reception of such application for relief from deportation as may be made and for further appropriate proceedings in connection therewith." The application for suspension of deportation was not formally made until 1953, after the 1952 Act had taken effect. The District of Columbia Court of Appeals held:

> "We think the Savings Clause applies to the proceedings thus reopened."

In other words, the court construed the motion to reopen for the purpose of making application for relief from deportation as a sufficient affirmative act to give rise to a proceeding within Section 405(a), the Savings Clause.

From the foregoing cases, the area within which the present case must be decided is defined. As in *Menasche* and *Aure,* the appellee here is not seeking to save a "right in process of acquisition" whether

or no affirmative action to implement said right has been taken, he seeks what is a "matter of grace" for which an application must be made. *Jay, Kaloudis, Wolf* (supra). The Savings Clause is invoked to preserve requirements for eligibility contained in the statute which was repealed and under which application was not made. In *Zacharias* and *Miyagi* the court construed the filing of the preliminary papers for an immigration visa in the one case and the motion for reconsideration and to reopen to make application for relief from deportation in the other case, as "affirmative" acts giving rise to a "status, condition, right in process of acquisition, act, thing, or matter then done or existing" or "proceeding", which could be "saved" by the Savings Clause. The last sentence of Section 405(a) states:

> "An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under Section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection."

It is the contention of the appellant that whether or not a deportation proceeding has been initiated by the issuing of a warrant of arrest, an applicant for discretionary relief of suspension of deportation must have taken affirmative action by filing an application for such relief under the statute then in effect. If the application was made under Section 19(c) of the 1917 Act, the Savings Clause, Section 405(a), saves to the

applicant the provisions of the 1917 Act in the consideration of said application. No affirmative action was taken by the appellee in this case prior to 1954. The application filed was under Section 244(a) of the 1952 Act. Section 19(c) was no longer in effect, having been repealed. The Board of Immigration Appeals has properly ruled that eligibility for the relief sought must be determined under the provisions of the 1952 Act.

The recent decision of the Court of Appeals for the District of Columbia in *Foradis v. Brownell,* No. 13216, decided January 17, 1957, ... F. 2d ..... further supports appellant's contention. *Foradis* had filed an application for suspension on October 16, 1952, which was subsequent to the date of *enactment,* June 27, 1952, but prior to the *effective* date of the 1952 Act, December 24, 1952. Section 405(a) of the 1952 Act . . . refers to an application which is pending on the date of *enactment* of this Act. The court concluded, page 3 of the slip sheet:

> "This statutory declaration that an application for suspension of deportation, pending on the date of enactment of the 1952 Act, shall be regarded as a proceeding within the meaning of subsection 405(a) is not a specific provision that such an application filed after that date but prior to the effective date of the Act shall not also be regarded as such a proceeding under the sweeping terms of the preceding provisions of the same subsection."

In Section 405(a), preceding the use of the term "enactment" reference is twice made to "at the time

this Act shall take effect", and in one instance the term "effective" is used. The use of "enactment" in the last sentence would seem to have been deliberate, but the court construed it to mean "effective." In any event an application must have been filed before the "effective date" of the Act. Otherwise there is nothing to be regarded as a proceeding to be saved.

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2. AFFIRMATIVE ACTION WAS REQUIRED BY APPELLEE UNDER SECTION 19(c) OF THE 1917 ACT PRIOR TO DECEMBER 24, 1952.

In *Hyun v. Landon,* 219 F. 2d 404 (9th Cir.), affirmed in the Supreme Court by an equally divided court, 350 U.S. 990, this Court said:

> "It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in case of extreme abuse will the courts intervene, as stated in *Carlson v. Landon,* 1952, 342 U.S. 524, 536 . . . 'it is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country is deemed hurtful.' See also: *Harisiades v. Shaughnessy,* 1952, 342 U.S. 580, *Shaughnessy v. United States ex rel, Mezei,* 1953, 345 U.S. 206, *Bugajewitz v. Adams,* 1913, 228 U.S. 585, 591, *Ng Fung Ho v. White,* 1922, 259 U.S. 276, 280, *Ocon v. Landon,* Dec. 1954, 9 Cir., 218 F. 2d 320, (*Ocon v. Landon,* Sept. 1956, 9 Cir., 237 F. 2d 177), *Galvan v. Press,* 9 Cir., 1953, 201 F. 2d 302, (347 U.S. 522), *Carlson v. Landon,* 9 Cir., 1950, 186 F. 2d 183 (342 U.S. 524)."

The existence of the discretionary authority as expressive of the "act of grace" is dependent upon the act of Congress creating it. When Congress repeals the act, the "grace" ceases. A deportable alien who seeks "grace" may make application only within the statutory authority existing at the time the application is made.

By Sec. 403(a) of the 1952 Act, Congress repealed Sec. 19(c) of the 1917 Act. No authority thereafter remained in the Attorney General under 19(c) other than as saved by the last sentence of Sec. 405(a) of the 1952 Act, which specifically refers to an application under Sec. 19.

Appellee herein made no application under 19(c) of the 1917 Act. He made application under 244(a) of the 1952 Act in 1954, long after the 1952 Act went into effect. An appeal taken from the ruling of the Special Inquiry Officer was dismissed in November 1955. In December 1955 appellee filed a motion to reopen to reconsider on the ground that the application for suspension made under 244(a) should be governed by Sec. 19(c) of the 1917 Act. The motion to reconsider was denied.

At the time appellee made his application for suspension the only authority for such relief was Section 244(a) of the 1952 Act.

The case of *Wolf v. Boyd* of this Court, 238 F. 2d 249, presents a similar time sequence. The proceedings were commenced before 1952. The original hearing started in 1949. Petitioner *Wolf* pursued judicial

review to denial of certiorari in the Supreme Court in 1955, 348 U.S. 951. A motion was then filed with the Board of Immigration Appeals to reopen the hearing to permit the respondent to file an application for suspension of deportation under Section 244(a)(5) of the 1952 Act. The motion was denied. The Board of Immigration Appeals held, page 253:

> "It is well settled that a rehearing on an administrative proceeding is not a matter of right but lies within the discretion of the agency making the order. United States v. Pierce Auto Freight Lines, Inc., 1946, 327 U.S. 515, 535, 66 S.Ct. 687, 90 L. Ed. 821, Interstate Commerce Comm., v. Jersey City, 1944, 322 U.S. 503, 514, 64 S. Ct. 1129, 88 L. Ed 1420."

This court at page 254 said:

> "Clearly petitioner is not entitled to a hearing as a matter of right, if the Board has exercised its discretion."

Beginning at page 254, Judge Learned Hand's opinion in *Kaloudis v. Shaughnessy,* 180 F. 2d 489, 490, 491 is quoted practically in its entirety.

The Second Circuit Court of Appeals decision in *United States ex rel Hintopoulas v. Shaughnessy,* 233 F. 2d 705, cert. granted, 352 U.S. 819, discloses an interesting facet of the discretionary function. *Hintopoulas,* an admittedly deportable alien, made application for suspension of deportation under Section 19(c) of the 1917 Act before December 24, 1952. He was found eligible under 19(c) but the Board of Immigration Appeals in the exercise of its discretion

denied the application. In the formulation of its discretion, the Board took into account, among other factors, its concept of congressional policy as manifested by Section 244(a) of the 1952 Act. At page 709 the court said:

> "In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1952 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act, not that the scope of its discretionary power was restricted by that Act."

Judge Frank dissented. The Supreme Court granted certiorari, 352 U.S. 819, and appellant is informed and believes the case was argued in the Supreme Court during the week of March 4, 1957. 25 L.W. 3248.

It is appellant's contention that although the Savings Clause may be broad, the "grace" of the sovereign with regard to suspension of deportation is contained in the statute in existence at the time an application therefor is made. A repealed statute affords no comfort to an applicant unless Congress has expressly saved its benefit. The only aliens who were saved possible benefits under Section 19(c) by Section 405(a) were those who had made application for suspension prior to the 24th day of December, the effective date of the 1952 Act. This appellee did not do.

CONCLUSION.

It is respectfully submitted that the court below erred in permitting the appellee a new hearing on his application for suspension of deportation in which his eligibility is to be determined under the 1917 Act, in granting a writ of habeas corpus staying petitioner's deportation until such hearing is had, and discharging appellee from cutody of appellant.

The order of the court below should be reversed, the writ denied, the petition dismissed and appellee remanded to the custody of appellant.

Dated, March 7, 1957.

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CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellant.